

<b>Naula v Upper Story LLC</b>
2023 NY Slip Op 30428(U)
February 8, 2023
Supreme Court, New York County
Docket Number: Index No. 652170/2021
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART 59

Justice

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WILSON NAULA, MANUEL OCHOA, and SABAS
ORLANDO CUAN,

Plaintiffs,

INDEX NO. 652170/2021

MOTION DATE 02/08/2023

MOTION SEQ. NO. 003 004

- v -

UPPER STORY LLC, THE CREATIVE EVENTS GROUP,
L.P., AMERIVENTS CATERING LLC, CHARLES PALMER,
and GAVIN MURPHY,

Defendants.

DECISION + ORDER ON
MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37,
38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 49, 50, 51

were read on this motion to/for LEAVE TO FILE

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of plaintiffs (motion sequence
number 004) to overlook the untimely service of their opposition
papers to the motion of defendants to dismiss the complaint
(motion sequence number 003) is granted, and upon further
deliberation, the court declines to award costs of opposing such
motion incurred by the defendants against plaintiffs arising out
of plaintiffs' lateness in responding; and it is further

ORDERED that the motion of defendant Charles Palmer to dismiss
the complaint for lack of personal jurisdiction over him and of

defendant Gavin Murphy to dismiss the complaint for the expiration of the statute of limitations for claims against him shall be held in abeyance for an immediate trial pursuant to CPLR 3211(c); and it is further

ORDERED that the matter having come on before this court on February 8, 2023 on motions to dismiss the complaint of the defendants Charles Palmer and Gavin Murphy, and the plaintiffs having appeared by Roman Mikhail Avshalumov, Esq., and the defendants having appeared by Felice B. Ekelman, Esq., and, pursuant to CPLR 4212, the court having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an appointment, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of whether defendant Charles Palmer was properly served pursuant to CPLR § 308(2) (by delivering the summons within the state to a person of suitable age and discretion at the actual . . . dwelling place or usual place of abode of the person to be served);

and

- (2) the issue of when defendant Gavin Murphy separated from the employment of the restaurant where the claims of plaintiffs arose;

and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR;

and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within thirty (30) days from the date of this Order, submit to the Special Referee Clerk by e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance

in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further;

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the second paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon; and it is further

ORDERED that counsel are directed to appear for oral argument via Microsoft Teams of any motion to confirm or reject the final report of the assigned Special Referee on May 3, 2023, 10:30 AM.

#### DECISION

The court grants plaintiffs' motion for leave from the court to have their untimeliness in opposing the motion of defendants to dismiss the complaint overlooked. The lateness of plaintiffs' submissions was neither intentional nor contumacious and defendants have failed to show that they suffered any prejudice. The court rescinds its oral ruling awarding attorneys' fees incurred by defendants in opposing plaintiffs' motion to have the court accept and consider such opposition papers, having found no precedent for such condition under the circumstances at bar. See Dinnocenzo v Jordache Enterprises Inc., 213 AD2d 219 (1<sup>st</sup> Dept. 1995) and Prato v Arzt, 79 AD3d 622, 623 (1<sup>st</sup> Dept 2010).

On the motion to dismiss of defendants Charles Palmer and Gavin Murphy, such defendants have submitted evidence with respect

to personal jurisdiction and the statute of limitations, which issues the court finds are appropriate for expeditious disposition of the claims against such defendants in an immediate trial pursuant to CPLR §§ 2218 and 3211(c). See Richmond Medical Center v Daines, 101 AD3d 1434 (3<sup>rd</sup> Dept 2012).

*Debra A. James*

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2/8/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE